United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,287

GEORGE THOMAS,

Appellant

712

UNITED STATES OF AMERICA

Appellee

APPEAL FROM

THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

WILLIAM P. BERNTON
621 COLORADO BUILDING
WASHINGTON, D. C. 20005
ATTORNEY FOR APPELLANT
(Appointed by this Court)

QUESTIONS PRESENTED

1. Whether a defendant may be convicted of carnal knowledge in the District of Columbia where the testimony of the victim identifying him as the assailant is uncorroborated by any other evidence.

2. Whether the facts of the present case are such as to provide corroboration of prosecutrix' testimony.

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No. 20,287

GEORGE THOMAS,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of the United States District Court for the District of Columbia in which appellant was tried for, and convicted of, the crime of carnal knowledge.*

This Court has jurisdiction under the Act of June 25, 1948, Ch. 646, Sec. 1; 62 Stat. 929; 28 U.S.C. Sec. 1291.

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*There are also involved in this appeal the Denial of a Motion to Dismiss the Indictment and a Motion for a New Trial. See Statement of the Case, infra.

Statement of the Case

On April 28, 1966, appellant was adjudged guilty of the offense of carnal knowledge of one Margaret Ailstock and sentenced to imprisonment for a period of three (3) to twelve (12) years.

At the trial, Margaret Ailstock had testified that she had been sexually attacked on the evening of February 12, 1965, at approximately 8:30 p.m. She testified that her attacker was "about five-five, and about 170 or 80* pounds and looked to be about 17 or 18 years old, and he had on a red checkered shirt and had on brown dress shoes--pointed shoes, one black glove on his hand, and I think he had a hat, I am not sure." In court, she identified appellant as her assailant. She had previously identified him at the office of the Sex Squad of the D. C. Police.

Officer William R. Holden of the D. C. sex squad testifying at the trial reported that the victim had described her assailant as "Negro, male, 17 to 18 years of age; 5'5", 140 to 150* pounds; dark skin; wearing red checkered shirt, tan pointed toe shoes, dark dress hat and one black glove."

The other witnesses for the prosecution testified to the general physical and mental condition of the victim on the evening of February 12, 1965, and there seems no doubt that she was the victim of a sexual attack at that time. However, no other witness identified appellant as her assailant; and there was no evidence other than her testimony, linking him to the crime.

Laura Butler, appellant's mother, testified that her son had never owned a red checkered shirt and that he had left home on

*Emphasis supplied.

February 12, 1965, dressed in a brown corduroy shirt, brown corduroy trousers, a tan workshirt and beige color "hush puppy" style sport shoes. The appellant did not take the stand.

The April trial was the second trial to which appellant was subjected for this offense. He was first tried in December, 1965; and at that trial the jury was unable to reach a verdict. Following the first trial appellant moved to dismiss the indictment. Following the second trial appellant moved for a new trial. Both motions raised the question of the sufficiency of the evidence.

The instant appeal, filed in forma pauperis, also alleges that appellant was convicted "upon insufficient evidence and upon the uncorroborated testimony of the prosecuting witness."

Statement of Points

1. Appellant's Motion to Dismiss the Indictment and Motion for a new trial were both improperly denied since there was no evidence whatsoever other than the testimony of the victim identifying appellant as her assailant or linking appellant in any way with the commission of the crime.

2. For the same reason, the jury's verdict, finding appellant guilty of the offense charged, cannot be allowed to stand.

(Since the foregoing argument is based for the most part on a lack of evidence, rather than on affirmative evidence in the record, the only parts of the record specifically called to the Court's attention are TR. 34 and 119, referred to at page 8, infra.)

Summary of Argument

Appellant does not deny that the crime in question did take place. He has, however, denied that he was the perpetrator of the offense.

The only evidence which in any way connects appellant with the crime is the uncorroborated testimony of the victim. Under the law of the District of Columbia this is insufficient evidence upon which to base a conviction of this offense.

Other cases, both in this jurisdiction and in others which adhere to this rule, require that the identification of the assailant by the victim must be corroborated by some other evidence. In this case there is neither direct nor circumstantial evidence corroborating the victim's identification of the appellant.

In view of this utter lack of corroboration of the victim's testimony identifying appellant as her assailant, the decision below should be reversed by this Court.

ARGUMENT

I.

THE CONVICTION IN THE INSTANT CASE CANNOT STAND WITHOUT CORROBORATION OF THE TESTIMONY OF THE VICTIM

Although the rule at common law was that the uncorroborated testimony of the complaining witness would support a conviction of the crime of rape and related offenses, several jurisdictions -- taking cognizance of the substantial possibility of injustice in such situations, have abandoned this tradition of the common law.

Some jurisdictions adopted statutes expressly requiring corroboration of testimony by the prosecutrix in this type of case. The District of Columbia altered the common law rule not by statute but by judicial pronouncement.

In Kidwell v. U.S., 38 App. D.C. 566, 573; (1912), the Court stated that:

> "We are aware that a conviction for this offense will be sustained upon the testimony of the injured party alone. But where the courts have so held, the circumstances surrounding the parties at the time were such as to point to the probable guilt of the accused, or, at least, corroborate indirectly the testimony of the prosecutrix."

It is recognized, as indicated above, that corroboration may be found either in the direct testimony of another witness or in the indirect evidence supplied by the circumstances surrounding the event. However, the corroboration must be of a dual nature. There must be corroboration that:

1. the crime did, in fact, take place, and that
2. the accused was the perpetrator of that crime.

In the instant case there is, unfortunately, no question that the crime was committed. However, although the prosecution presented five witnesses in the trial of this case, none of them other than the prosecutrix herself identified appellant as the perpetrator; and the record contains no other evidence, or circumstances, to link appellant to the crime in any way whatsoever.

II.

THE NECESSARY CORROBORATION OF APPELLANT AS THE VICTIM'S ASSAILANT IS LACKING

Since Kidwell (supra) this Court has consistently insisted on corroboration of identity in rape cases. Indicative of the nature of the corroboration that has been held sufficient are Brown v. U.S., 69 App. D.C. 96; 99 F 2d 131 (1938), where a companion of the victim confirmed that the accused had committed rape on the prosecutrix and Roberts v. U.S., 109 U.S. App. D.C. 75; 284 F 2d 209 (1960), Cert. den'd., 368 U.S. 863, 82 S. Ct. 109 (1961); where, on the day following the assault, the defendant was seen wearing the articles the victim said assailant had worn at the time of the crime.

A case where a corroboration of identification was held to be lacking was Franklin v. U.S., 117 U.S. App. D.C. 331; 330 F 2d 205 (1964), where the victim had testified that Franklin had been wearing a stocking cap at the time he allegedly assaulted her, but there was no evidence that he had ever owned a stocking cap and, accordingly, Franklin's conviction was reversed. See also McKenzie v. U.S., 75 U.S. App. D.C. 270; 126 F 2d 533 (1942), where the victim testified that her assailant was wearing a brown suit at the time of the crime. When arrested, defendant was wearing a grey suit; and no evidenc

was introduced to show he owned a brown suit.

In the instant case, the victim testified that it was appellant who had committed the crime. However, she stated that her assailant was wearing a red checkered shirt (Tr. 34); and there is no evidence that appellant ever owned such a garment. There was no other evidence identifying appellant as her assailant; and there was affirmative evidence that appellant had never owned a shirt such as the victim described. (Tr. 119). Under these circumstances, Franklin and McKenzie provide a fortiori precedents for reversal.

III.

APPELLANT'S FAILURE TO TESTIFY IN HIS OWN DEFENSE DOES NOT PROVIDE THE REQUIRED CORROBORATION

No citation should be needed to support the proposition that the appellant's failure to take the stand cannot be construed as corroboration of any facet of the prosecution's case.

The defendant in a prosecution for rape does not have the obligation of making out a complete defense. McKenzie v. U.S., (supra). The burden of showing defendant guilty beyond a reasonable doubt remains on the Government. The defendant should never be placed in the position of having to make out a complete defense in his own behalf. As stated in Commonwealth v. Stoltz, 147 Pa. Super 117; 24 A 2d, "The burden is on the State to prove every fact and circumstance which is essential to the guilt of the accused." Even if appellant offered no evidence whatsoever in his defense, no conviction may be had unless the Government is able to carry its burden of proof.

In People v. Bills, 114 N.Y.S. 587; 129 App. Div. 798 (1909), a man accused of having intercourse with his 13 year old daughter was released for want of corroboration. The Court pointed out in that case the defendant's failure to testify in his own behalf could not be considered against him.

IV.

THE RULE IS FOLLOWED IN OTHER JURISDICTIONS

New York has adopted a statute requiring corroboration of the testimony of female rape victims. §2013 of the Penal Law of N.Y. In People v. Romano, 279 N.Y. 392, 18 N.E. 2d 634 (1939), the prosecutrix identified defendant as one of her assailants and testified that he had raped her when her powers of resistance had been beaten down in an effort to repulse other assailants. However, the Court held that this testimony required corroboration if it were to support a conviction. See also People v. Cunningham, 95 N.Y.S. 2d 189, 276 App. Div. 983 (1950).

The rule is followed in other jurisdictions. Corroborative testimony must be evidence other than the testimony of the prosecutrix herself and must proceed from sources other than the prosecutrix herself. State v. Elsen, 68 Idaho 50; 187 P. 2d 976 (1947). A Georgia case, Wright v. State, 184 Ga. 62; 190 S.E. 663 (1937) held that where corroboration is required there must be corroborating evidence fairly tending to prove that the crime was committed and that it was committed by accused. Under a statute precluding conviction unless the female is corroborated by other evidence tending to connect accused

with the commission of the offense, the word "corroboration" means testimony of some substantial fact or circumstance independent of the statement of the prosecutrix. Prichard v. State, 282 N.W. 529, 631, 132 Neb. 522 (1938). No such facts exist in the present case; and the absence of such facts demands a reversal of the conviction.

The purpose of statutes requiring corroboration in rape cases is to protect those who might be accused of such crimes from conviction without satisfactory evidence of guilt. State v. Lehman, 296 N.W. 819, 230 Iowa 141 (1941). In that case, the prosecutrix's brother testified that the defendant's car was the one his sister entered but was unable to identify the driver. The further fact that bobby pins of the kind prosecutrix testified she wore (but which had no special mark, were found in defendant's car twelve days after the crime was committed) and the fact that defendant's sister lived in the neighborhood where the alleged assault took place were held to be insufficient corroboration.

A New Jersey Court did recently hold that a conviction for a morals offense could be sustained on the uncorroborated testimony of the victim. State v. Balles, 221 A 2d 1 (1966).

This case involved testimony by the mother of the victim, which was admitted under the "fresh complaint" rule. The daughter was enrolled in defendant's remedial reading school and had been taking lessons regularly for several months. An appointment book produced by the victim's mother contained entries conflicting with defendant's testimony. Another witness testified that she had driven one of the mother's children to defendant's office. Admittedly, there was no direct corroboration by another witness. However, it is clearly seen that the circumstances were such as to prove that defendant had been seeing the victim for several months as a tutor and had been given ample opportunity to commit the offense in question. The present case differs in circumstances since no evidence was adduced that defendant had previously known the victim nor was there any evidence other than her testimony that he had ever come in contact with her at all.

The Court in Balles, supra, pointed out that the victim's testimony establishing the offense received some support from her behavior while telephoning (as testified to by her mother), and from her appearance upon leaving the defendant's office (as testified to by her stepfather). In the instant case, there is no evidence, other than the testimony of the victim herself, placing appellant with the victim at the time of the crime. Thus, even the rule of the Balles case would not support a conviction in the instant case.

CONCLUSION

Chief Judge (then Judge) Bazelon, dissenting in Walker v. U.S., 96 U.S. App. D.C. 148; 223 F 2d 613, 621 (1955) made a strong pronouncement of the effect of Kidwell, supra, in the District of Columbia, stating: "I have found no case in which this Court has affirmed a rape conviction in the absence of substantial corroboration of identity." In the present case, there is no substantial corroboration of identity and, indeed, no corroboration of identity at all. Moreover, as pointed out in the dissent in the Walker case, the plain meaning of the corroboration rule in rape cases requires acquittal as a matter of law when there is no evidence, direct or circumstantial, corroborating the testimony of the complaining witness.

In the absence of any corroboration at all that it was appellant who was the assailant in this case, that must be the ultimate disposition of the instant proceeding. That is, however, as it should be for, in the words of an English court of a by-gone era: "Rape is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent." 1 Hale, Pleas of the Crown, 635.

For the foregoing reason the judgment appealed from must be reversed.

Respectfully Submitted,

George Thomas

By _____

November 1, 1966

William P. Bernton
621 Colorado Building
Washington, D.C., 20005

His Attorney

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,287

GEORGE THOMAS,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

CERTIFICATE OF SERVICE

I hereby certify that on this first day of November, 1966, I served a copy of Appellant's Brief in the above-captioned proceeding upon David Bress, Esq., United States District Attorney for the District of Columbia, by leaving a copy thereof at his office.

William P. Bernton

William P. Bernton

REPLY
BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS
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REPLY
BRIEF FOR APPELLANT

INTRODUCTION

Appellee's brief herein recognizes, but obscures, the sole question involved in this appeal, which is: whether the complainant's uncorroborated identification of appellant as her assailant was sufficient to support a verdict of guilty of the offense with which appellant was charged.[1/]

1/ In view of what was shown in our brief in chief and will be repeated herein, we cannot accept the language of appellee's "Questions Presented" that the identification by the complainant was "positive [and] convincing."

That question, in turn, breaks down into two sub-questions:

1. What, if any, corroboration of identity is, or should be, required in rape cases in this jurisdiction? and

2. If such corroboration is to be required, was that requirement satisfied in the instant case.

I

The Requirement of Corroborative Evidence in Rape Cases is a Salutary One

Appellant has not, in his brief, contested the fact of corpus delicti, so much of what is set forth in appellee's brief is wholly irrelevant to the question before the Court. However, appellant does maintain, most emphatically, that a requirement of corroboration as to identity should be recognized in this jurisdiction; and that such requirement was not satisfied in the instant case.

The public policy arguments requiring corroboration in cases of rape are many and obvious and need not be set out at great length in this brief. They range all the way from the Shakespearean recognition that "Hell hath no fury like a woman scorned" to Hale's terse comment (cited in our brief in chief) that, although rape is hard to be proved, it is "harder to be defended by the party accused, tho never so innocent."

In the instant case, no claim is made that the complainant was not criminally assaulted or that her identification

of appellant was malicious or psychotic. Appellant merely contends that the identification was erroneous. However, a defendant in a rape action is entitled to be protected against an erroneous identification, even though made in good faith, to the same extent that he is entitled to be protected against one that is inspired by malice or is the product of a psychotic mind. Neither skillful police work, nor the right to counsel, nor any of the other rights referred to in footnote 8 of appellee's brief affords the accused the kind or quantum of protection that is afforded by a rule requiring that the complainant's identification of her assailant be in some way corroborated by other evidence.

II

That Requirement is Recognized in the District of Columbia

Just as we are satisfied that such a rule is in the public interest, we are satisfied that the rule is recognized by the precedent cases in the District of Columbia. In spite of all that appellee has stated in its brief, the rule in this jurisdiction, as stated in Kidwell v. United States,[2/] 38 App. D.C. 566 (1912), and carried forward in Ewing v. United States, 77 U.S. App. D.C. 14, 135 F.2d 633 (1942), and Walker v. United States, 96 U.S. App. D.C. 148, 223 F.2d 613 (1955), is that, in all prosecutions involving rape,

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2/ See quoted language at Page 6 of our brief in chief.

there must be some corroboration of the complainant's story.3/

The Ewing and Walker cases neither restricted nor overruled the rule of Kidwell that such corroboration was required. In both Ewing and Walker an attempt was apparently made to enlarge Kidwell to require that there be eye-witness corroboration of the complainant's charge. The Court's action in those cases, refusing to so enlarge Kidwell was not, however, a repudiation of the basic rule that some corroboration was still necessary in order to sustain a verdict of "guilty." And, as pointed out in Chief Judge (then Circuit Judge) Bazelon's dissent in Walker, the cases decided in this jurisdiction under the rule of the Kidwell case require corroboration of identification as well as of the corpus delicti.

III

The Record Evidence in This Case Does Not Satisfy the Requirement for Corroboration

In his dissent in the Walker case, Chief Judge (then Circuit Judge) Bazelon took issue with the majority not so much over the rule by which the case was decided but because of the way that rule was applied to the facts of that case. It

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3/ We believe that the rule is the same in cases involving forcible rape as in those involving statutory rape or "carnal knowledge." The Kidwell case involved the latter; and Ewing and Walker involved the former; and, in the latter two cases, the Court did not appear to make any distinction between the two offenses.

was his contention that there was insufficient corroboration of identification. However, even in Walker there were strong circumstances which tended to corroborate defendant's identity as the assailant:

1. Defendant admitted he had known a woman with the same name as complainant but claimed that she was dead. It was shown, however, that there was no record of the death of any woman bearing that name.

2. Although defendant took the stand, he refused to affirm or deny many of the relevant facts alleged by the complainant.

3. "[Defendant's] attitude when 'questioned also might have been regarded as corroborative to some extent.'" (96 U.S. App. D.C. at p. 154).

4. There were "other circumstances," which the Court felt "need not be set forth" which "also corroborated [the complainant's] testimony." Ibid.

None of the above factors are present in the instant case.

The appellee claims that there is confirmation of appellant's identification as the perpetrator of the crime in that appellant was shown to have been away from home at the time the crime was committed and that, on the night of the crime, he had been seen to enter a nightclub one block away from where the crime was committed. We do not, however, believe that, in the circumstances of this case, this is "corroboration" in the Kidwell sense.

Under the Iowa statute, evidence that goes no further than to show that the defendant had an opportunity to

commit the offense with which he is charge is not sufficient to meet the requirement of corroboration which that statute creates. State v. Howard, 230 Iowa 365, 297 N.W. 821 (1941). Certainly such evidence does not, in the language of Kidwell "point to the probable guilt of the accused" (38 App. D.C. 566, 573); it is far less corroboration than was present in Walker, supra; and we have found no case in which corroboration of any nature was required where that requirement was held to be so easily satisfied.

Moreover, this evidence must be considered in the context of the other evidence relating to complainant's identification of the appellant. It must be remembered that complainant first told the police that her attacker weighed 140 to 150 pounds (Tr 86) but, at the trial (with appellant seated in front of her) she changed the figure to 170 to 180 pounds (Tr 34). Also, she testified at the trial that her attacker had worn "a red checkered shirt and had on brown dress shoes - pointed shoes...." whereas appellant's mother testified that, on the night of the crime, appellant was wearing "a brown corduroy shirt....a tan work shirt [apparently underneath the corduroy shirt]...." and "beige color shoes made in the style of a hush-puppy." (Tr 118)

Finally, as noted in our brief in chief, appellant's mother also testified that appellant had never owned a red shirt. (Tr 119)

Because there was no evidence that appellant had ever owned a red shirt - and the evidence is, in fact to the contrary, this case has some of the elements of McKenzie v. U.S., 75 U.S. App. D.C. 270, 273; 126 F.2d 533 (1942), where the identification of appellant was held to lack the "convincing" nature that is essential to sustain a conviction. Moreover, since this evidence is inconsistent with the complainant's testimony, it must be said that, even if her identification had been somewhat corroborated, the evidence disputed that identification far more than it supported it; and, indeed, the case of Franklin v. U.S., 117 U.S. App. D.C. 331; 330 F.2d 205 (1964) would seem to present an a fortiori precedent for reversal.[4/]

CONCLUSION

Inasmuch as the rule requiring corroboration of identification is observed, and properly so, in the District of Columbia; and inasmuch as the record evidence of this case fails to corroborate the complainant's identification of

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4/ In that case the complainant said Franklin was wearing a stocking cap at the time of the offense. Corroboration was held not to have been established "because there is no other evidence that Franklin ever had a stocking cap," 117 U.S. App. D.C. at p. 335. In the instant case, of course, there is affirmative evidence that appellant never owned one of the articles of apparel the complainant said her assailant wore at the time of the crime.

appellant as her assailant, the judgment and orders appealed from should be reversed.

Respectfully submitted,

GEORGE THOMAS

By_____
William P. Bernton
His Attorney
(Appointed by this Court)

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply Brief for Appellant was, this 20th day of December, 1966, delivered by hand to:

David Bress, Esq.
U. S. Attorney
U. S. Court House
Constitution Ave. & John Marshall Pl.,N.W.
Washington, D. C.

William P. Bernton

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,287

GEORGE W. THOMAS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

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United States Attorney.

FRANK Q. NEBEKER,
JOEL D. BLACKWELL,
Assistant United States Attorneys.

Of Counsel:

ROBERT A. ACKERMAN,
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Cr. No. 262-65

QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented:

1) Whether a conviction for forcible or statutory rape must be reversed because the complaining witness' identification of the accused as the assailant is not corroborated by circumstances in proof tending to support her identification, even where the identification is positive, convincing, and based on adequate opportunity for observation, the circumstances in proof amply corroborate other aspects of her testimony, and there is no evidence of bad reputation of the complaining witness for veracity or chastity and no indication of psychopathy productive of false accusation or other improper motive.

2) Whether the circumstances in proof in the present case tend to support the complaining witness' identification of the accused as the assailant.

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*Cases chiefly relied upon are marked by asterisks.

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,287

GEORGE W. THOMAS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

This is an appeal from a carnal knowledge conviction in which (after one mistrial because of a "hung jury") appellant received a three to twelve year sentence on June 17, 1966. Appellant asserts a need for and a lack of corroboration of the victim's identification of appellant.

On February 12, 1965 Margaret Ailstock, the complaining witness in this case, was forcibly raped in the playground a few blocks from her home. She was then fifteen. Appellant has been tried twice for this statutory rape. The first jury was unable to reach a verdict on December

10, 1965. Appellant moved on January 25, 1966 to dismiss the indictment for insufficient evidence and for insufficient corroboration of the prosecutrix' testimony. This motion was denied on February 4, 1966.

According to the prosecutrix' testimony at the second trial in April, 1966: she left her home about 8:30 p.m. on the evening of the rape to walk to the home of a girl friend (Tr. 23). On the way she was accosted by a youth she had never seen before who struck up a conversation with her despite her efforts to fend him off (Tr. 25). He followed her across the street, grabbed her arm, and would not let her go. She began to scream and cry but no passers-by stopped to help her (Tr. 27-28.) The youth forced her to sit on a nearby ledge for two or three minutes while he talked to her. He said he went to Eastern High School and had just gotten out of jail[1] (Tr. 30.) Appellant went to Eastern High School (although this fact was not in evidence at trial). During this encounter, prosecutrix testified, she had ample opportunity to observe the youth under good lighting conditions (Tr. 37, 39). She got up and moved away, whereupon the assailant grabbed her by the neck, pulled her into an alleyway and through various fences into the playground of Myrtilla Miner School, choking her as he pulled her (Tr. 30-31). It was dark there. The assailant said a few words to an unidentified man who was there, who then left (Tr. 31). The assailant forced prosecutrix down to the ground, choked her to force her to take one leg out of her under pants, and had intercourse with her on a section of concrete (Tr. 31-33). After the act she fled directly home and told her mother and grandfather what had happened. The grandfather testified that prosecutrix

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[1] Information that appellant had recently been released from jail was before the trial judge (though not the jury) from appellant's Motion for a Mental Examination filed March 25, 1965. Therein appellant represented that in July, 1964, he was arraigned before the District Court on a charge of forcible rape. He was subsequently released from the District jail when the indictment was dismissed on November 24, 1964. See also Crim. No. 653-64.

was "in terrible shape . . . hooting, hollering, crying, scratched up, muddy, hair all messed up . . . few light scratches on her neck." (Tr. 99-101.)

The police were called about 9:55 p.m. and arrived shortly thereafter (Tr. 77). The officer testified that prosecutrix was crying and upset when he arrived and took her report (Tr. 77). She testified that she described the assailant to the officer as about five feet, five inches, about *170 or 180 pounds*, apparent age seventeen or eighteen, dressed in red checkered shirt, dress shoes with pointed toes, one black glove on his hand, and probably a hat (Tr. 34). The officer testified she described assailant as Negro, apparent age seventeen to eighteen, five feet, five inches, *140-150 pounds*, dark skin, dressed in red checkered shirt, tan pointed toe shoes, dark dress hat, one black glove, and smelling of alcohol (Tr. 86). The officer saw "redness on her neck that appeared to be welts" but no blood (Tr. 90). The officer retraced her route with her to the scene of the act and then took her to D. C. General Hospital for medical examination about 11:00 p.m.

The doctor who examined prosecutrix testified that examination showed spermatozoa in her vagina, much blood in the vaginal vault, recent interruption of the hymen, and much redness of the vaginal mucosa, which indicated strongly that she had recently had sexual relations for the first time (Tr. 8-10, 14, 15). The doctor did not notice any bruises on scratches on her body (Tr. 8). Emotionally, she was "in control . . . very reticent and very quiet and very docile at that time." (Tr. 10). Her clothes "indicated they had been pulled" and her blouse was pulled or raised and apparently missing a button (Tr. 12).

The prosecutrix identified the accused from police photographs. He was arrested on the day after the act and positively identified by the prosecutrix on that day and at trial. He denied the act to police.

The owner of a nightclub one block away from the scene of the act testified that he observed appellant enter

his club sometime between 8:00 p.m. on the night of the act and 2:00 a.m. of the following morning, thus placing appellant near the scene within hours of the act (Tr. 138).

The appellant's mother testified that he had never owned a red shirt in his life (Tr. 119, 130, 131).

The prosecutrix' story was internally consistent and not inherently improbable. Able and vigorous cross-examination failed to shake her testimony (Tr. 38-71, 73-74). There was no evidence that she had a bad reputation for veracity or chastity, and no indication of possible psychopathy productive of a false accusation or of other improper motive.

The second jury found appellant guilty on April 28, 1966. Appellant moved for a new trial on May 2, 1966. The District Court heard argument on this motion and on an oral motion for judgment n.o.v. and denied both on May 19, 1966. From final judgment of the District Court appellant now appeals, alleging that he was convicted upon insufficient evidence and upon the uncorroborated testimony of the prosecuting witness.

SUMMARY OF ARGUMENT

Corroboration of a convincing positive identification by the complaining witness based on adequate opportunity for observation is not necessary to sustain a conviction for statutory or forcible rape, particularly absent a bad reputation for veracity or chastity and absent indications of psychopathy or other improper motive. However, corroboration of identification was provided in this case by circumstances in proof tending to support the complaining witness' story generally, and also tending specifically to link appellant to the crime. Evidence showed that: complaining witness had recently had initial sexual relations; she reported speedily to police; she was emotionally upset shortly after the act; her neck was scratched and her hair and clothes disordered. Evidence placed appellant near the crime scene within about two to four hours of the act.

ARGUMENT

I. A convincing identification by the complaining witness in a forcible or statutory rape case based on adequate opportunity to observe the assailant need not be further corroborated as a matter of law, absent a bad reputation for veracity or chastity or indications of psychopathy or of other improper motive on the part of the complaining witness. There is sufficient evidence to sustain appellant's conviction. The District Court properly denied his motion to dismiss the indictment and for a new trial.

(Tr. 38-71, 73-74)

In cases of forcible or statutory rape evidence tending to corroborate the complaining witness' story is often scanty and sometimes entirely lacking. Determination of guilt depends on resolution of two contradictory statements, the accusation of surreptitious rape and the denial. In this respect, rape prosecutions differ from most other criminal prosecutions, where additional evidence can usually be presented to show probability of guilt or innocence.

Like other American jurisdictions, the District of Columbia has traditionally allowed heavy reliance by juries on demeanor of witnesses to gauge credibility in forcible and statutory rape prosecutions as in other criminal prosecutions. *Walker* v. *United States*, 96 U.S. App. D.C. 148, 151, 223 F.2d 613, 616 (1955); 3 Wigmore, Evidence § 946 (3d ed. 1940). In both forcible and statutory rape prosecutions the courts have also valued and in many situations required independent corroboration of the proscutrix' testimony [2] to sustain a guilty verdict, both as to

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[2] At common law and in England today corroboration is valued but not required as a matter of law. 7 Wigmore, Evidence § 2061 (3d ed. 1940). Less than half the states normally require corroboration to sustain conviction. Five American jurisdictions had specific statutory requirements of corroboration as of 1952 (Georgia, Iowa, Mississippi, New York, and Tennessee). See *People* v. *Romano*, 279 N.Y. 392, 18 N.E. 2d 634 (1939). Other states re-

corpus delicti (penetration by force) and, sometimes, as to the prosecutrix' identification of the accused as the assailant, *Franklin* v. *United States*, 117 U.S. App. D.C. 331, 330 F. 2d 205 (1964). Where corroboration was required, the courts have valued "direct" corroboration, but have required only "that there must be circumstances in proof which tend to support the prosecutrix' story," *Ewing* v. *United States*, 77 U.S. App. D.C. 14, 135 F.2d 633 (1942), *cert. denied*, 318 U.S. 776 (1943).

In those cases where admissible corroborative evidence could be uncovered by police technique requiring corroboration of the prosecutrix' story has undoubtedly helped protect the defendant against false accusation without unduly handicapping the government's efforts to quarantine rapists and to limit the incidence of the crime and the psychic damage it causes. Much reconciliation could be achieved in those individual cases between needs to protect the innocent and to make crime prevention through law enforcement more effective by increasing re-

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quire corroboration only if the prosecutrix' story "is physically impossible, or so incredible that no reasonable man could believe it." *State* v. *Haston*, 64 Ariz. 72, 166 P.2d 141 (1946); or if her story is improbable or contradictory, *State* v. *Smith*, 237 S.W. 482, 485 (Mo. 1922); or if her story is not "clear and convincing", *People* v. *Burns*, 364 Ill. 49, 4 N.E. 2d 26, 29 (1936); or if the charge has been denied by the defendant, *People* v. *Grudecki*, 373 Ill. 536, 27 N.E. 2d 51 (1940); or if the charge has been discredited by other evidence, *State* v. *Siebke*, 216 Minn. 181, 12 N.W. 2d 186 (1943); or if the complaining witness has failed to make prompt complaint of the offense, *Ex Parte Merrill*, 150 Tex. Crim. Rep. 365, 201 S.W. 2d 232 (1947); or if the girl's character has been impeached, *State* v. *Elsen*, 68 Idaho 50, 187 P.2d 976 (1947). Several jurisdictions do not require corroboration of the complaining witness in any case. *People* v. *Gidney*, 10 Cal. 2d 138, 73 P.2d 1186 (1937); *Commonwealth* v. *Ebert*, 146 Pa. Super 362, 22 A.2d 610 (1941); *State* v. *Gatlin*, 208 S.C. 414, 38 S.E. 238 (1946); *Taylor* v. *Commonwealth*, 180 Va. 413, 23 S.E. 2d 139 (1942). Corroboration has been held unnecessary even where her reputation for veracity and chastity was bad. *Herndon* v. *State*, 2 Ala. App. 118, 56 So. 85 (1911). Other representative cases are collected in 60 A.L.R. 1124 et seq. and in *Forcible and Statutory Rape; An Exploration of the Operation and Objectives of the Consent Standard*, 62 Yale L.J. 55 (1952).

spect for the professionalism and integrity of law enforcement agencies. Admissible corroboration cannot always be found by police technique, however.[3] Not all rapists are careless enough to recontact the prosecutrix wearing the same clothes on the day following the attack as in *Roberts* v. *United States*, 109 U.S. App. D.C. 75, 284 F.2d 209 (1960), *cert. denied*, 368 U.S. 863 (1961); or leave their fingerprints at the scene as in *Hughes* v. *United States*, 113 U.S. App. D.C. 127, 306 F.2d 287 (1962); or to do the act under the eyes of witnesses as with accused's co-defendants in *Franklin* v. *United States*, 117 U.S. App. D.C. 331, 330 F.2d 205 (1964); or to volunteer an oath to authorities that they will "never touch" the victim again as in *Miller* v. *United States*, 93 U.S. App. D.C. 76, 207 F.2d 33 (1953); or to remain at the scene long enough for police, alerted by the first passer-by the victim met after freeing herself, to find the accused still there with his pants down as in *McGuinn* v. *United States*, 89 U.S. App. D.C. 197, 191 F.2d 477 (1951); or to make ad-

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[3] The situation where skillful, hard pressed investigation can produce additional evidence is reflected in Justice Frankfurter's statement in *Watts* v. *Indiana*, 338 U.S. 49, 54 (1949) (murder conviction reversed as violative of due process since based on forced confession) that:

> Ours is the accusatorial system as opposed to the inquisitorial system . . . [S]ociety carries the burden of proving its charge against the accused not out of his own mouth . . . but by evidence independently secured through skillful investigation.

The situation where skillful, hard pressed investigation cannot develop further evidence except by talking to suspects surrounded with the full panoply of Constitutional protections is reflected in Justice Frankfurter's statement in *Culombe* v. *Connecticut*, 367 U.S. 568, 571 (1961) (murder conviction reversed as violative of due process since based on forced confession) that:

> Despite modern advances in the technology of crime detection, offenses frequently occur about which things cannot be made to speak. And where there cannot be found innocent human witnesses to such offenses, nothing remains—if police investigation is not to to be balked before it has fairly begun—but to seek out possibly guilty witnesses and ask them questions . . . such questioning is often indispensable to crime detection.

missible damaging admissions as in *Robinson* v. *United States*, 76 U.S. App. D.C. 29, 128 F.2d 322 (1942).

That surreptitious forcible and statutory rape occurs frequently is reflected in the continuing flow of cases of conviction where the chief evidence is the victim's accusation and the defendant's denial and in which appellate courts consider: whether and when corroboration is necessary to sustain conviction, whether corroboration is necessary as to identification as well as *corpus delicti*, whether the jury and trial court finally determine that the evidence presented as corroboration is or is not sufficient to constitute corroboration or whether the appellate court does, and whether such evidence does constitute corroboration.[4] There is much variation among states which do require corroboration as a matter or law. There is rarely a clearly defined rule within a state about the sort of evidence which constitutes corroboration, when it must be offered, or the extent to which it must support the allegations.

In criminal prosecutions in the District of Columbia corroboration of a prosecuting witness' testimony is generally not required.[5] Safeguards against false accusation

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[4] Illustrative cases are collected in 7 Wigmore, Evidence § 2061 n.1 (3d ed. 1940), in 60 A.L.R. 1124 et seq., and in *Forcible and Statutory Rape; An Exploration of the Operation and Objectives of the Consent Standard*, 62 Yale L.J. 55, 61 n. 44 (1952). Wigmore thought that:

> . . . in the light of modern psychology, this technical rule of corroboration seems but a crude and childish measure, if it be relied upon as an adequate means for determining the credibility of the complaining witness in such charges. The problem of estimating the veracity of feminine testimony in complaints against masculine offenders is baffling enough for the experienced psychologist. The statutory rule is unfortunate in that it tends to produce reliance upon a rule of thumb. Better to inculcate the resort to an expert scientific analysis of the particular witness' mentality, as the true measure of enlightment. 7 Wigmore, Evidence § 2061 (3d ed. 1940).

[5] Other exceptions to the general criminal rule are taking indecent liberties with children, *Wilson* v. *United States*, 106 U.S. App. D.C. 226, 271 F.2d 492 (1959); perjury, *Maragon* v. *United States*, 87 U.S. App. D.C. 349, 187 F.2d 79 (1950), *cert. denied*, 341 U.S. 932

for murder, arson, mayhem, and other most serious crimes have been found, not in rules prescribing quantum or character of evidence necessary to prove a particular crime, but in the prosecution's burden to prove guilt beyond a reasonable doubt,[6] in defendant's privilege to testify in his own behalf,[7] in the right to assistance of counsel, in vigorous cross-examination, and in the judgment of conscientious judges and jurors dealing with individual cases.[8] This so even where a heavy sexual

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(1951); and invitation to sodomy, *Kelly* v. *United States*, 90 U.S. App. D.C. 125, 194 F.2d 150 (1952). Corroboration of testimony of a government narcotics agent is not required as a matter of law, *Wilson* v. *United States*, 118 U.S. App. D.C. 319, 335 F.2d 982 (1963).

[6] The origin of the burden to prove guilt beyond reasonable doubt was about 1798, well after the 1680 utterance of Lord Hale's oft repeated aphorism regarding the difficulty of defending against a rape accusation. 9 Wigmore, Evidence § 2497 (3d ed 1940); *Some Rules of Evidence; Reasonable Doubt in Civil and Criminal Cases*, 10 Am. L. Rev. 642, 656 (1876).

[7] The defendant's privilege to testify was denied at common law until long after Lord Hale's 1680 aphorism. It was established in states in the 19th Century, beginning with Maine in 1864, and in federal courts by statute of 1878, former Title 28 U.S.C. § 632, now 18 U.S.C. § 3481.

[8] Other rights guaranteed to a defendant in a federal criminal prosecution include: the right not to have dwelling or person searched for purposes of seizing anything other than fruits or instruments of the crime, if he has not been arrested, and then only if a warrant identifying property and describing person or place to be searched has been issued by a judicial officer after a finding of probable cause supported by affidavit; the right to be presented without unnecessary delay before a United States Commissioner, who will inform him of his right to retain counsel, his right to a preliminary examination, and his privilege against self-incrimination; the government's obligation to present evidence sufficient to convince the Commissioner, if defendant asserts his right to preliminary examination, that there is probable cause to believe that he has committed the offense charged; the right not to be tried unless charged formally by at least twelve laymen who are members of a grand jury; the right to know the charges against him; the right to sufficient time to prepare his defense if he is indicted; the right not to have trial unreasonably delayed; the right to jury trial; the right to compulsory process; the right to confront witnesses against him; the right not to have evidence introduced against

element is involved, as where a husband is charged with murdering his wife for adultery. The exception for rape, where it is made, and for some other sexual crimes, is often merely attributed to the sexual nature of the crime, with any more precise analysis of the reasons left to imagination. Undoubtedly risks of jury error in convicting in the absence of much corroboration of either *corpus delicti* or identification were analysed and calculated more fully than the language of many opinions indicates, rather than merely feared in an unanalysed way because sex is involved. Courts are reluctant to go into sexual detail in published opinions concerning individuals.[9]

The reasons for the sometime exception requiring corroboration in forcible and statutory rape cases stem from the possibilities outlined below, which the court tests when reviewing convictions as seen in the cases analysed *infra.* Attention is given to the reasons for valuing corroboration regarding *corpus delicti,* since the sometime rule requiring corroboration of identification grew out of the *corpus delicti* rule and is still closely associated with it.

1) *The prosecutrix may be deliberately and maliciously distorting her report of the sexual encounter to secure money, marriage, or revenge.*[10] There is no reason for

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him obtained through illegal search and seizure, unlawful wiretapping, or in-custody police interrogation in the absence of desired counsel; the right, generally, not to have evidence of his bad character introduced against him; the right to avoid cross-examination by not taking the stand; the right not to have the prosecutor comment upon failure to take the stand; the right, if convicted, to appeal on any nonfrivolous ground, with counsel appointed for him; if conviction is affirmed, the right to use various post-conviction remedies to attack collaterally the judgment entered against him as described in 28 U.S.C. 2255 (1958).

[9] Chief Judge Bazelon's dissent in *McGuinn* v. *United States,* 89 U.S. App. D.C. 197, 201, 191 F.2d 477, 481 (1951) urges the necessity for clarity in detailing to the jury precisely what is involved in a sexual crime charged without regard to conventional proprieties.

[10] "She [the prosecutrix] further testified . . . that what she swore on the formal trial was false; that she had already become a girl of bad character at the time the accused had relations with her, and that she was induced to make false statements by her

assuming without a showing that normal criminal law enforcement techniques and trial procedures are less effective in detecting attempted witting deception in rape charges than attempted witting deception in other criminal cases. Research has disclosed no District of Columbia case which concluded that they are less effective and gave this as a reason for establishing a requirement as a matter of law of corroboration regarding either *corpus delicti* or identification in cases of possible witting deception. Appellant has cited none.

2) *The prosecutrix may have actually consented to the act at the time, or may have been so torn between desire and resistance that she did not herself know whether the lack of consent existed which is an essential element of forcible rape, but was later moved by the processes of rationalization to recall and report her attitude as one of opposition.* It is known to both psychiatrists and common men that women sometimes alternate approach and rejection responses to a male advance, either consciously or unconsciously, with the effect of encouraging the male advance. In the cold light of dawn thereafter, women who consented at the time but cannot admit it to themselves later or who had an ambivalent attitude falling well short of lack of consent may recall and report to authorities only an attitude and behavior amounting to lack of consent. The woman who consented at the time may erase this fact from her mind. The woman whose attitude was ambivalent may recall only the urge to resist, not the urge to consent. Such women are not malicious or psychopathic. They are normal.

The ready agreement with Lord Hale's aphorism probably reflects a common feeling that such a female response on the part of mentally normal women is far from infrequent. For a jury to find whether or not such women showed lack of consent is indeed difficult when

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mother to enable the latter to force money from the [accused] and also to break up the criminal relations existing between him and her sister Maggie; that is to separate them, so that her mother could obtain money by using Maggie as a lure for other men." *Dunn* v. *State*, 127 Tenn. 267, 281, 154 S.W. 969, 972 (1913).

they do not realize themselves when they make their accusation that they did not feel or show the necessary lack of consent at the time. Reason may indeed well be found here for a rule requiring corroboration as to *corpus delicti where lack of consent is an element of the offense.*[11] That these things are so provides no reason, however, for requiring corroboration as a matter of law in statutory rape cases to insure that the facts of the prosecutrix' consent or lack of consent are accurately found, since lack of consent is not an element of the offense. Sweeping authoritative language can be found in other jurisdictions requiring in all cases corroboration of an under age prosecutrix' testimony regarding *corpus delicti.*[12] And there

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[11] *Farrar* v. *United States*, 107 U.S. App. D.C. 204, 275 F.2d 868 (1959), petition for rehearing *en banc* denied (1960), exemplifies the situation where it seems impossible for either jury or appellate court to determine with confidence whether lack of consent existed at the time of the act. It posed in the sharpest form uncovered by research the dilemma of accusation and denial of forcible rape with substantially no other evidence to help find the facts. It illustrates the difficulties of the consent standard, fortunately not present in statutory rape cases such as the instant case. Accused accosted the eighteen year old prosecutrix on the street, unknown to him before, and took her to his room a few blocks away. There they had intercourse twice over a period of hours. The prosecutrix slipped away and reported rape to the police, claiming she had been threatened with a knife, which was never found. Identification of the accused was not an issue. As reflected in three opinions, *corpus delicti* was. Conviction was reversed for lack of corroboration. The case illustrates the central dangers to which Lord Hale's warning was directed: "[rape] is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent." 1 Hale, Pleas of the Crown 635 (1680).

[12] See for an example *Prichard* v. *State*, 135 Neb. 522, 282 N.W. 529 (1938), which reversed a conviction of statutory rape of a thirteen year old girl for insufficient evidence. The case is cited by appellant for the proposition that "corroboration" means testimony of some substantial fact or circumstance independent of the statement of prosecutrix. To distinguish from the present case: in *Prichard* the girl's hymen was found intact; here medical examination showed recent initial intercourse; the *Prichard* prosecutrix was of limited mentality and her testimony showed many inconsistencies; here there is no reason to question the prosecutrix' mentality and her testimony withstood able and vigorous cross-examination; there

may be reason in the circumstances of some statutory rape accusations by little girls to require corroboration that intercourse took place at all.[13] There is no warrant in reason, however, for uncritically transferring experience built up in forcible rape cases, where a broad requirement for corroboration of *corpus delicti*, i.e., penetration by force, is well grounded, to statutory rape cases, where reason for such a uniform rule cannot be found as to either *corpus delicti* or identification. Nor does the reason for the forcible rape *corpus delicti* corroboration requirement provide grounds for requiring identification corroboration in forcible rape cases. Appellant has cited no reason for extending the requirement beyond forcible rape *corpus delicti* questions.

3) *The prosecutrix may be a psychopathic fabricator of a forcible or statutory rape story who is herself unaware of the totally fanciful nature of the complaint.* In some cases such psychopathic deception may not be detectable by normal law enforcement and trial procedures. In many, and probably in most, such cases the falsity of the accusation is so detectable. Whether so detectable or not, the fact that such psychopathic women exist is undeniable.[14] A check with the sex squad in any large

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had been bad feeling in *Prichard* between the defendant and the prosecutrix' father which the court appeared to feel might have been the real reason for the charge; here there is no indication of improper motive. Whether or not *Prichard* is taken in Nebraska as authority for the blanket proposition that corroboration of both *corpus delicti* and identification is always required in statutory as well as forcible rape cases, clear reason for overturning the conviction is found in the facts of the case without espousing undifferentiating application of the forcible rape *corpus delicti* corroboration rule to all identification questions in all forcible and statutory rape cases.

[13] See statement by Dr. Manfred Guttmacher and Prof. Henry Weihofen and cases involving little girls cited in note 17, *infra*.

[14] See statements of Drs. William Healy, Karl A. Menninger, William A. White, and W. F. Lorenz reprinted in 3 Wigmore, Evidence § 924a (3d. ed 1940). The case histories from psychiatric experience collected there are convincing that deluded women do exist. They are not convincing that most such cases will escape detection by

[14] (Continued)

normal police or trial procedures, although they are cited by psychiatrists and Wigmore to show the danger that they will remain undetected by non-psychiatrists or psychologists. "Case 14" cited by Dr. Healy concerned a thirteen year old girl who falsely charged a stranger with sexual assault. *For the preceding year she had been "lying excessively and in uncalled for ways."* (emphasis supplied in this note) She had been *expelled from school* and *"by her false accusations she had created must [sic] trouble for the police in her home town . . . . She had been notoriously untruthful."* The man she accused "was later discharged in the police court, however, because he abundantly proved an alibi, and because by this time the girl's story had become so twisted that even the mother did not believe it. A *physician's examination also tended to prove that no assault had been attempted . . . .*" "Case 15" cited by Dr. Healy concerned a sixteen year old girl who over a period of weeks made extreme accusations against members of her own family, giving a detailed account of sexual immorality. "The family circumstances and her clearly detailed account gave the color of possibility to her accusations, but *investigation proved them false. . . .* We were *asked to study this case by police officials,* who thought perhaps the girl was the victim of some delusional state . . . . *Investigation by detectives on the strength of her convincingly given details proved [her brother's] innocence. . . .* When the case came up in court she stated she wished to go back to live with this brother and admitted having continued misrepresentations about him . . . ." "Case 16" cited by Dr. Healy concerned a girl of nine and one half who accused her brother and father of incest. "Her father and brother were held in jail for several weeks, but were *dismissed at the trial because of the ascertained untruth of the charges . . . .* We were requested to study this case by the judge of the court in which the father and brother of B.M. were to be tried. . . . At a *preliminary hearing the judge had felt that the remarkable statements of the little girl savored of untruth . . . .*" "Case 18" cited by Dr. Healy concerned a girl of seven who had been placed in an institution for dependent children after being taken from very bad home conditions apparently including unfortunate sex experiences. She "had given some sort of description of a big boy in the institution who she said had assaulted her. *There was no such person there,* but her vehement statements caused much disturbance." "Case 21", the next one cited by Dr. Healy, concerned a woman of nineteen who *"had been the source of much trouble in a certain locality on account of her false accusations.* She was taken in hand by a charitable organization and found a home. In a short time she made the shocking announcement . . . that the husband had made immoral advances to her. *He was a man of excellent character and of course this could not be believed."* Dr. Karl Menninger in arguing that every girl entering a plausible but unproved story of rape should

(Footnote continued on following page.)

city will usually confirm this. Police specialists who process rape complaints are typically familiar with a number of regular false complainants. At least some complaints come from elderly deluded women whose stories are immediately discounted even by those with little experience in investigating such reports. Some deluded women whose age does not immediately throw their stories in doubt may be so obviously mentally disordered

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[14] (Continued)

have a psychiatric examination cited only one case included by Wigmore, that of a man who *"at the age of 70 or close thereto* was charged by a mentally abnormal spinster in the late twenties of having *raped her in his office and having repeated the crime several times in one day.* There were *many elements of obvious absurdity in the story,* but notwithstanding this, the man was sentenced to the federal prison for a long sentence." Dr. Menninger did not identify the case or the police agencies and court which believed that a man about 70 could commit rape many times in one day. Dr. William A. White stated that, "I am sure I have known a number of cases where the most terrible injustice resulted from false accusations. *Some such cases have been tried in court; others have never reached trial."* Dr. White did not give any case histories or indicate what was the result of those cases known to him which reached trial. Dr. Lorenz does not give any case histories. These case histories reprinted by Wigmore give support for the notion that such false accusations often cause the person accused considerable embarrassment. Although they give very questionable support for the notion that such deluded women are often or at least sometimes immune to police and trial scrutiny, they are often cited to support that notion, e.g.; "Her belief, just as the distorted recall of the 'normal' girl, may lead to accusation and possible conviction since, contrary to popular opinion, the accounts of these girls are often highly convincing. . . . Only highly trained medical men can detect the psychopathic origin of the accusation." *Forcible and Statutory Rape; An Exploration of the Operation and Objectives of the Consent Standard,* 62 Yale L.J. 55, 69 n. 103 citing Wigmore's collection of cases. Another example of false reliance on these cases is: "the fact [is] that false accusations of sex offenses may be engendered by personality disturbances not discernible to a court or jury. This renders a courtroom appraisal of the complaint's testimony virtually impossible." *Psychiatric Aid in Evaluating the Credibility of a Prosecuting Witness Charging Rape,* 26 Ind. L.J. 98, 101 n. 10 (1950), citing Wigmore's collection of cases.

that their stories will be suspected even by laymen.[15] Excluding these easily detectable deluded women leaves a residue of women whose stories are false, whose psychopathy from which the delusions flow is not discernible by laymen or police specialists, whose accounts may be convincing, and who are presumably immune to the polygraph [16] but not to a probing psychiatrist or psychologist with adequate opportunity for examination. In this residue may admittedly be found reason for an exception to the general criminal law requiring corroboration of a woman's rape accusation regarding both *corpus delicti* and identification to sustain convictions of statutory as well as forcible rape. But the true dimensions of this danger-productive residue, which may be quite small, should be accurately assessed before guilty rapists are made immune in other cases by an automatic requirement of corroboration of identification in all statutory or forcible rape cases to guard against this danger. For purposes of statutory rape, the much larger numbers of normal women who may falsely report lack of consent after a sexual encounter should be excluded in measuring the residue.[17] If a corroboration requirement regarding

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[15] "It is only in the most dilapidated psychotic that a delusion is not based to some extent on actual events." Overholser, *The Psychiatrist and the Law* 63 (1953).

[16] "The Lie Detector, as is well known, is based on the principle that an emotional disturbance will register in the physiological reactions . . . . Finally, we come to the pathological liar type which, owing to a serious emotional derangement, lost the ability to differentiate between reality and fiction. The pathological liar certainly will not show any significant reaction to the lie detector test." Floch, *Limitations on the Lie Detector*, 40 J. Crim L. & Criminology 651-2 (1950).

[17] Deluded female children may account for more fanciful false accusations of statutory rape and other sexual offenses than deluded girls of fourteen or fifteen. Guttmacher and Weihofen, *Psychiatry and the Law* (1952) state at 374 that: "It is well recognized that children are more highly suggestible than adults. Sexual activity, with the aura of mystery that adults create about it, confuses and fascinates them. Moreover, they have, of course, no real understanding of the serious consequences of the charges

either *corpus delicti* or identification is to find durable support in reason, it should not be based on mere speculation that many such undetectably psychopathic under age women exist, either absolutely or as compared to the number of rapists who will be immunized against quarantine by wider application of the corroboration requirement than the extent of the danger calls for.[18]

Psychopathic women alone provide whatever reason there is for a special rule requiring identification corroboration in forcible rape cases, absent bad reputation for veracity or chastity or other indication of improper motive. Psychopathic under age women alone provide whatever reason there is for requiring *corpus delicti* or identification corroboration in statutory rape cases, ab-

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they make. As a consequence most courts show an admirable reluctance to accept the unsubstantiated testimony of children in sexual crimes." The court recognized this in *Wilson* v. *United States*, 106 U.S. App. D.C. 226, 227, 271 F.2d 492, 493 (1959), a case of alleged indecent liberties with an eleven year old girl, where it said: "In cases involving young girls, we have held that 'the *corpus delicti*' in a case such as this may not be established by the victim's spontaneous declaration," citing *Fountain* v. *United States*, 98 U.S. App. D.C. 389, 236 F.2d 684 (1956) (young child, age unstated); *Jones* v. *United States*, 97 U.S. App. D.C. 291, 231 F.2d 244 (1956) (five year old girl), and *Brown* v. *United States*, 80 U.S. App. D.C. 270, 152 F.2d 138 (1945) (three year old girl). Presumably a special rule requiring corroboration regarding *corpus delicti* and identification grounded in the need to guard against fanciful false accusations by female children would have no reason for application to cases involving the fourteen or fifteen year old young women who are the more likely targets for a rapist.

[18] Even where "everyone knows" there are many such undetectable, dangerous women and expert medical opinion may at the present stage of its development support this common view. "One of the early cases (1665) involved one of the most famous doctors in English history, Sir Thomas Browne, who testified that there were such things as witches. In that case his evidence was an important and perhaps deciding factor in causing the jury to send to their deaths two poor old women. . . . Sir Thomas, of course, was speaking of things of the existence of which he did not know from experience or observation, although in those days 'everybody knew' there were witches." Overholser, *The Psychiatrist and the Law* 106 (1953). The case involved was *R.* v. *Cullender and Duny*, 6 How. St. Tr. 687 (1665).

sent these factors. An identification corroboration requirement should thus be established in either forcible or statutory rape cases only upon a showing that:

1) Sufficient danger of false accusation by psychopathic women exists to outweigh immunizing some guilty surreptitious rapists in other cases,

2) This danger can be better guarded against by applying a rule of thumb requiring corroboration of identification in all cases than it can be by more flexible case by case examination by jury and trial court,

3) An appellate court without demeanor evidence available to it can better determine whether sufficient evidence exists to constitute the necessary identification corroboration than can a jury functioning under the guidance of a trial court, which can direct a verdict of acquittal whenever the government's case is inadequate or set aside a verdict when it is convinced that it has been returned upon insufficient evidence,[19]

4) There is no better way of reconciling needs to guard against psychopathic false accusers and to quarantine guilty rapists than to require identification corroboration as a rule of thumb in all forcible and statutory rape cases.[20]

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[19] Lord Hale's solution to the problem of guarding against the danger in forcible rape cases against which he warned was to rely upon a properly warned jury to find the facts, not to take the question away from the jury. His statement in context was: "The party ravished may give evidence upon oath and is in law a competent witness; but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury, and is more or less credible according to the circumstances of fact that concur in that testimony . . . . It is one thing whether a witness be admissible to be heard; another thing, whether they are to be believed when heard. It is true, rape is a most detestable crime and therefore ought severely and impartially to be punished with death; but it must be remembered that it is an accusation easily to be made and hard to be proved; and harder to be defended by the party accused, tho never so innocent." I Hale, Pleas of the Crown 633, 635 (1680).

[20] Wigmore felt that in all cases charging sex offenses the prosecutrix should be examined before trial by competent psychiatrists. 3 Wigmore, Evidence § 924a (3d ed. 1940). He quotes from a 1937-

The development of District of Columbia law has reflected sensitivity to the above factors. The court has avoided flat rules mechanically applied in favor of flexibility to achieve fullest reconciliation in the individual case of needs to protect the accused against false accusation and to quarantine guilty rapists.

1938 *Report of the American Bar Association's Committee on the Improvement of the Law of Evidence*: "Today it is *unanimously* held (and we say 'unanimously' advisedly) by experienced psychiatrists that the complainant woman in a sex offense should *always* be examined by competent experts to ascertain whether she suffers from some mental or moral delusion or tendency, frequently found especially in young girls, causing distortion of the imagination in sex cases . . . . The warnings of the psychiatric profession, supported as they are by thousands of observed cases, should be heeded by our profession." (Regarding the "thousands of cases", those cited by Wigmore give questionable support for the conclusion that many such deluded women will escape detection by police and trial procedures; see note 14, *supra*.) In *Wilson* v. *United States*, 106 U.S. App. D.C. 226, 227, 271 F.2d 492 (1959), a case of alleged indecent liberties with an eleven year old girl, the court said in 1959 of Wigmore's suggestion: "We have not adopted that view and do not adopt it now." An alternative to routine psychiatric examination in all cases would be examination upon the pre-trial request of the prosecuting or defense attorney only in those cases of alleged forcible or statutory rape where corroborating evidence of *corpus delicti* or identification is lacking or where reason exists to suspect possible psychopathy. Presumably either attorney would have the right to petition the court for appointment of qualified psychiatrists to conduct the examination and prepare a report for introduction in evidence at trial. Courts have long admitted psychiatric opinion evidence where mental disease or defect is an issue, of course. Several courts have been willing to admit psychiatric opinion evidence of mental disorders in sex complaint cases. *Miller* v. *State*, 49 Okla. Cr. 133, 295 P. 403 (1930) (evidence that complainant was a nymphomaniac and that the diseased condition of her mind would make her testimony unreliable); *Rice* v. *State*, 195 Wis. 181, 217 N.W. 697 (1928) (expert testimony indicating that prosecutrix was depraved mentally, and imagined things entirely beyond reality); *People* v. *Cowles*, 246 Mich. 429, 224 N.W. 387 (1929) (evidence that prosecutrix was a pathological liar, a nymphomanic, and a sexual pervert); *State* v. *Pryor*, 74 Wash. 121, 132 P. 874 (1913) (evidence that prosecutrix was suffering from hysteria); *Mell* v. *State*, 133 Ark. 197, 202 S.W. 33 (1918) (evidence of a prosecuting witness' insanity); *Jeffers* v. *State*, 145 Ga. 74, 88 S.E. 571 (1916) (expert testimony that prosecutrix was "considerably below the average" in mental development).

Kidwell v. *United States*, 38 App. D.C. 566 (1912), has been held in the years since its decision generally to require corroboration in rape cases "in the sense that there must be circumstances of proof which tend to support the prosecutrix' story". *Ewing* v. *United States*, 77 U.S. App. D.C. 14, 17, 135 F.2d 633, 636 (1942) *cert. denied*, 318 U.S. 776 (1943). Appellant cites *Kidwell* for the sweeping proposition that corroboration is not only valued but uniformly required in all rape cases, whether forcible or statutory, both as to *corpus delicti* and identification. Nothing in the *Kidwell* facts, language, or reasoning supports such an interpretation expanded beyond the *rationale* outlined *supra*. The *Kidwell* indictment joined two counts for statutory rape allegedly occurring half a year apart and with two different prosecutrix. The court held that joining the two counts was reversibly improper, since the jury might regard one as corroborative of the other when, in fact, no corroboration existed. The court acted at that point to avoid false corroboration, not to require positive corroboration. One prosecutrix had testified that she had intercourse only once in her life, with defendant, and had become pregnant thereby. The court held it reversible error not to allow her to be cross examined concerning intercourse she might have had with other men around the time of conception, stating:

> "In cases of this sort [i.e., pregnancy] the inducements to perjury and revenge are so great that it is of the highest importance that the motive and character of the prosecutrix should be rigidly investigated."

Kidwell v. *United States*, 38 App. D.C. 566, 573 (1912). This contrasts with the instant case where the prosecutrix had no inducement to perjury or revenge and where full opportunity for vigorous cross examination was given and taken (Tr. 38-71, 73-74), her testimony remaining unshaken.

The other prosecutrix in *Kidwell* had lived with defendant's family for three years during which, she testi-

fied, he had intercourse with her regularly at every opportunity, with no indication that other members of the family ever learned of this alleged intercourse. This situation might have posed sharply the dilemma of accusation and denial with no other evidence available, were it not for evidence showing that this prosecutrix had a bad reputation for veracity and was known to have an "incorrible character". The court reversed a conviction based on the unsupported testimony of this impeached witness, saying in language often quoted to illustrate the working of the corroboration requirement:

> We are aware that a conviction for this offense will be sustained upon the testimony of the injured party alone. But where the courts have so held, the circumstances surrounding the parties at the time were such as to point to the probable guilt of the accused, *or, at least, corroborate indirectly the testimony of the prosecutrix.* In this case defendant was convicted under this count upon the bald statement of the prosecutrix that the acts had extended continuously over a period of three years in the house of defendant, where his wife and family resided. *In view of the respectable standing of defendant, as shown by the evidence, and the incorrigible character of the prosecutrix and her bad reputation for truth and veracity in the community where she resided and was known,* we do not think the evidence in support of this charge rises to the required standard. *Kidwell* v. *United States*, 38 App. D.C. 566 (1912). (emphasis added)

There is authority in *Kidwell* for a requirement of corroboration of the testimony of a prosecutrix shown to have a bad reputation for veracity. There is authority in *Kidwell* for a requirement that opportunity must be given for vigorous cross examination of prosecutrix. There is nothing in *Kidwell*, however, which requires automatic reversal of a conviction in all cases of either statutory or forcible rape where the prosecutrix' testimony is uncorroborated. The *Kidwell* language rather indicates that a conviction may be sustained upon the

testimony of the injured party alone, unless her reputation for truth is bad, her story incredible or rendered improbable by other evidence, or unless there is some other factor present in addition to defendant's denial making her story questionable, such as indications of possible improper motive.

Brown v. *United States*, 69 U.S. App. D.C. 96, 99 F.2d 131 (1938), a forcible rape case where "the only question was one of identification", did not pose the dilemma or give light on how to solve it, since direct corroboration was available in the form of a companion of the victim at the time of the assault who identified the accused at trial. The case is an example wherein production of solid corroboration was possible and served to protect the rights of the accused without preventing conviction of a rapist.

In *Ewing* v. *United States*, 77 U.S. App. D.C. 14, 135 F.2d 633 (1942), *cert. denied*, 318 U.S. 776 (1943), a forcible rape case, direct testimony by another witness was not available to support the positive identification * (asterisks indicate factors in common with instant case) of the nineteen year old prosecutrix, based on adequate opportunity to observe. The dilemma of accusation and denial without corroboration or impeachment of either prosecutrix or accused was not posed, however, since there was substantial corroboration to support either the prosecutrix' accusation or the accused's denial. Whatever result the jury came to in weighing the evidence, evidence substantially excluded the possibility that the prosecutrix was a psychopath or had other improper motive for the charge. It also substantially excluded the possibility that she had consented to the act.* The court found sufficient corroboration to support a guilty verdict in evidence that: the accused was near the scene around the time of the act * (slept in same house that night), otherwise unexplained force had been used * to break into her bedroom, complaint was made within hours *; medical examination showed she had recently had intercourse for the first time *; and she was unusually nervous and distraught

shortly following the act *. There was entire absence of proof of any improper motive for the charge *, either conscious or psychopathic.

The *Ewing* court interpreted *Kidwell* to require only "that there must be circumstances in proof which tend to support the prosecutrix' story, *Ewing* v. *United States*, 77 U.S. App. D.C. 14, 17, 135 F.2d 633, 636 (1942), *cert. denied* 318 U.S. 776 (1943), or that, in the *Kidwell* language, "the circumstances surrounding the parties at the time [be] such as to . . . corroborate indirectly the testimony of the prosecutrix" *Kidwell* v. *United States*, 38 App. D.C. 566, 573 (1912). The *Ewing* court said nothing requiring corroboration of prosecutrix' identification of the accused as well as of the *corpus delicti*, and appellant has cited nothing claimed to have that effect. The *Ewing* court further made it clear that as a matter of principal absolute safety for the accused was not to be purchased at the price of throwing around him a wall of immunity, which would be the effect of requiring the testimony of an additional eyewitness or other "direct" evidence as demanded by defendant in that case.

Robinson v. *United States*, 76 U.S.App.D.C. 29, 128 F. 2d 322 (1942), a statutory rape case where conviction was upheld, did not pose the dilemma, since there it was possible for police to obtain much substantiating evidence both of the identification and the crime. Some was circumstantial. Some was testimony concerning damaging admissions made by defendant. To conclude from this case, where identification corroboration was possible, that there must be an acquittal as a matter of law in all forcible or statutory rape cases where the prosecution cannot produce corroboration to support a positive, unimpeached identification by prosecutrix based on adequate opportunity to observe the assailant, is not to solve the dilemma. It is either to disregard its existence, or to conclude that courts do not have the ability to resolve it without throwing a wall of immunity around those surreptitious rapists against whom skillful, hard-pressed police technique functioning within the Constitution cannot produce corrobora-

tion of identification,[21] even though there may be circumstances in proof amply tending to support the prosecutrix' story in other respects.

McKenzie v. *United States*, 75 U.S.App.D.C. 270, 126 F.2d 533 (1942), a forcible rape and robbery case in which conviction was reversed, turned on the questionable nature of prosecutrix' identification of the accused. Two days after the rape she was driven in a police car through Negro sections in a random effort to spot the assailant. She identified the accused standing on a corner. Her initial description to police had been of a man between thirty and thirty-five, whereas accused was described at trial as a boy. Her story thus thrown in doubt, the court looked vainly for corroboration where it might realistically be found if the accused were guilty. Neither the pistol the assailant had supposedly used, the clothing he had supposedly stolen, nor the money he had supposedly taken was found in his possession. Prosecutrix testified he wore a brown suit during the rape, but there was no evidence he owned a brown suit. The court held it reversible error to refuse an instruction that if the circumstances of the identification were not convincing the jury should acquit. In strong contrast with the facts in *McKenzie* is the positive, unimpeached, and unshaken identification of prosecutrix in the instant case, based on adequate opportunity for observation.

Walker v. *United States*, 96 U.S.App.D.C. 148, 223 F. 2d 613 (1955), a forcible rape case in which conviction was affirmed, came closer to the facts of the instant statutory rape case and to the dilemma of unimpeached, largely uncorroborated witnesses. Prosecutrix gave the only direct testimony of the rape.* (Asterisks indicate factors in common with instant case). Her identification of the

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[21] Cases are admittedly conceivable in which unskillful police technique fails to exploit all leads properly, or in which hard working, skillful policemen are prevented from doing so by personnel and budget limitations. But nothing in the cases interpreting the corroboration rules indicates that it is proper to assume without a showing that lack of corroboration in a case is due to faulty police technique.

accused was positive and based on adequate opportunity to observe.* Her credibility was not impeached by bad reputation for veracity or otherwise.* There was no suggestion of improper motive on her part,* either conscious or psychopathic. She had, indeed, never seen the accused before.* Vigorous cross-examination failed to shake her story.* *Walker* differed from the instant case, however, in that there the accused took the stand, gave demeanor evidence to his disadvantage, and allowed introduction of a hurtful previous rape record. The court found corroboration in that: prosecutrix' coat had mud stains * and twigs on it after the act; she reported the matter to authorities as soon as she could *; she had a timely medical examination * (although the results were unavailable for presentation at trial); her hat was found next day at the scene described by her; the ground where she said the act occurred showed signs of considerable disturbance; there was no suggestion of improper motive,* either conscious or psychopathic; and her testimony was unshaken by cross-examination.* The court also found highly important the circumstances attendant upon accused's taking the stand, i.e. demeanor evidence. He answered glibly on every point which he recognized to be favorable to himself and he either sparred or evaded or was silent otherwise. The majority reaffirmed the *Ewing* rule that the corroboration required was that there be circumstances in proof which tend to support the prosecutrix' story. The majority did not expressly make the laying of this requirement depend on the *Kidwell* facts of a prosecutrix who has been impeached by bad reputation for veracity or a prosecutrix who has been improperly shielded from vigorous cross-examination. *Kidwell* v. *United States*, 38 App. D.C. 566 (1912). Neither did the majority refashion the *Kidwell* rule as interpreted in *Ewing* v. *United States*, 77 U.S. App. D.C. 14, 135 F.2d 633 (1942), *cert. denied*, 318 U.S. 776 (1943) to require circumstances in proof which tend to support the prosecutrix' story regarding identification as well as *corpus delicti*. In significant language the court said:

> In any event, and in each case, the ultimate effect to be accorded to "corroboration" can be achieved through the exercise by the trial judge of his power to direct a verdict of acquittal whenever the government's case is inadequate, or to set aside a verdict when he is convinced it has been returned upon insufficient evidence. *Walker* v. *United States*, 96 U.S. App. D.C. 148, 152, 223 F.2d 613, 617 (1955)[22]

Chief Judge Bazelon in dissent felt that a rape conviction should be upheld only if there were circumstances in proof tending to support prosecutrix' story regarding identification as well as *corpus delicti*. He gave no reason why this should be so, other than to cite cases where sufficient corroboration of identity had been found and to declare that he had found no case in this jurisdiction where conviction had been sustained in the absence of substantial corroboration of identification. As illustrative of cases where sufficient corroboration was found, Chief Judge Bazelon cited *McGuinn* v. *United States*, 89 U.S. App. D.C. 197, 191 F.2d 477 (1951) (forcible rape and sodomy in which police found accused still at the scene with his pants down, accused admitting intercourse in writing but denying it at trial); *Robinson* v. *United States*, 76 U.S. App. D.C. 29, 128 F.2d 322 (1942) (statutory rape where corroborative evidence included damaging admissions); and *Brown* v. *United States*, 69 U.S. App. D.C. 96, 99 F.2d 131 (1938) (forcible rape where victim's companion also identified accused). He did not distinguish between forcible rape and statutory rape in regard to the corroboration of identification he felt should be required. His opinion in this forcible rape case, however, was instinct with awareness of the importance of finding lack of consent as an essential element.

Roberts v. *United States*, 109 U.S. App. D.C. 75, 284 F.2d 209 (1960) was a case of forcible rape, robbery,

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[22] Federal judges may also elicit the truth by examination of witness and may summarize and comment upon the evidence. *Roberts* v. *United States*, 109 U.S. App. D.C. 75, 284 F.2d 209 (1960), *cert. denied*, 368 U.S. 863 (1961) (robbery, rape, and sodomy).

and sodomy. As in *Franklin* v. *United States*, 117 U.S. App. D.C. 331, 330 F.2d 205 (1964) *infra*, prosecutrix' identification of the accused was thrown in doubt by inadequate opportunity to observe. She did not see the assailant's face during the act, although she did see his attire and an identification bracelet. The defect in identification was cured, however, by strong corroborative evidence. On the next day the accused telephoned her to arrange another meeting, which she attended with police in the wings. Accused approached the prosecutrix dressed in the same attire, asking for her by name. As corroboration of *corpus delicti*, two girls testified they saw a man, whom they later identified as accused by his attire in a line-up, drag a woman to the rape scene.

In *Franklin* v. *United States*, 117 U.S. App. D.C. 331, 330 F.2d 205 (1964), the prosecutrix' identification of the accused as one of four men who forcibly raped her was flawed by inadequate opportunity for observation. A coat partially covered her face during the act, she testified, allowing her to see only part of assailant's face. After initial doubts whether the accused was the man, she identified him positively. Corroboration of her flawed identification, which in the circumstances of the situation might have been expected, was lacking: a companion of prosecutrix who had been held at bay was able to identify two other rapists in the group but not the accused. Fingerprints of two of the rapists were found nearby, but not those of the accused. It was thus clear that a fourth man had raped her, but only prosecutrix' faulty identification was available to show that accused was the fourth man. The court found insufficient identification corroboration in the mere fact that victim had been raped or in her testimony that assailant wore a stocking cap during the act, absent evidence that accused ever had such a cap. In reversing the conviction for this reason, the court made clear that it was not going beyond *Walker* to establish a flat requirement for corroboration of identification in all cases. The court said:

> In the latest expression of this court as to the need for corroboration in proof of rape is *Walker* v. *United States*, 96 U.S. App. D.C. 148, 223 F.2d 613 (1955). We adhere to the teaching of that case. *Franklin* v. *United States*, 117 U.S. App. D.C. 331, 334, 330 F. 2d 205, 208 (1964).

The court noted the value which it had placed in the past on circumstances in proof tending to corroborate prosecutrix' story as to identification as well as to *corpus delicti*. While not expressly distinguishing between forcible rape where lack of consent is an essential element and statutory rape where it is not, the court said that the danger of an erroneous identification in a rape case was not of the same magnitude as the danger of a fabricated rape, noting that both dangers were comprehended in Lord Hale's warning aphorism. In reversing the conviction for lack of corroboration to support prosecutrix' flawed identification of accused, the court said:

> Perhaps in the circumstances of a particular case, a convincing identification by the complaining witness based on adequate opportunity to observe need not be further corroborated, but this is not such a case. Compare *Walker* v. *United States*, *supra*. *Franklin* v. *United States*, 117 U.S. App. D.C. 331, 335, 330 F.2d 205, 209 (1964).

The reason, facts, and language of the line of cases in which the District of Columbia rape corroboration rule has been developed thus show that: absent a bad reputation for veracity or chastity or indications of psychopathy or other improper motive, a convincing identification by the complaining witness in a forcible or statutory rape case based on adequate opportunity to observe need not be further corroborated as a matter of law.

Nothing in the cases cited by appellant requires District of Columbia courts automatically to free persons otherwise convictable as rapists because corroboration is not present to support prosecutrix' positive identification as well as her testimony as to *corpus delicti*. The reversal of a forcible rape conviction in *Commonwealth* v. *Stoltz*,

147 Pa. Super 117, 24 A.2d 57 (1942) turned on prejudicial language by trial court to jury, not present in the instant case. Appellee agrees, however, with the proposition for which appellant cites it, namely, that the burden is on the government to prove all elements of the offense with which the accused is charged.

New York is one of five states which have statutes requiring corroboration of the prosecutrix' story,[23] the New York statute being to the effect that no conviction can be had for rape or defilement upon the testimony of the female defiled, unsupported by other evidence. Appellant cites three cases decided under this statute. In *People* v. *Bills*, 114 N.Y.S. 587, 129 App. Div. 798 (1909), the defendant's rape conviction for intercourse with his thirteen year old daughter was reversed for lack of corroboration of her story as to *corpus delicti*. Identification was not an issue. Setting aside the fact that the New York statute has no force in this jurisdiction, the result would likely have been the same in the District of Columbia for three reasons which distinguish the case from the instant case: 1) the age of the girl would bring her within the rule requiring corroboration of the accusations of children as to *corpus delicti* in sexual offenses (see note 17 *supra*), 2) it seemed quite probable that she had had intercourse with other men, i.e., that she had a bad reputation for chastity, and 3) "the evidence of the complainant was not very satisfactory".

In *People* v. *Romano*, 279 N.Y. 392, 18 N.E. 2d 634 (1939), a conviction of defendant as one of a group which forcibly raped prosecutrix was reversed for lack of corroboration required by the New York statute, with a new trial ordered. Identification of defendant was the major issue. There were no circumstances in proof corroborating prosecutrix' identification. This reversal resulted from the inflexible requirement of the statute that corroboration of identification be present in all cases to sustain conviction. It does not follow that because New York and the District of Columbia each have a corroboration requirement in

[23] As of 1952.

rape cases that the workings of the rule are the same in each jurisdiction, without regard to whether the case involves a young child or grown woman, an alleged forcible rape or statutory rape, a prosecutrix with a good reputation for veracity or one with a bad reputation, or the many other factors to which the courts in this jurisdiction have shown themselves sensitive in deciding individual cases. *People* v. *Cunningham,* 95 N.Y.S. 2d 189, 276 App. Div. 983 (1950), likewise appears to depend on the inflexible working of the New York statute.

State v. *Elson,* 68 Idaho 50, 187 P.2d 976 (1947), reversed a conviction for assault with intent to rape for insufficient corroboration of the twelve year old prosecutrix' story. The court stated that an Idaho conviction may be sustained on the uncorroborated testimony of the prosecutrix in certain cases, but not when her character for chastity or veracity is impeached. The prosecutrix' character regarding chastity had been thrown in doubt by her own testimony of many acts of intercourse with other men. Other testimony had shown that she had a bad reputation for veracity. For these reasons, the court said, this case required evidence other than the testimony of the prosecutrix. A similar result would have been called for by District of Columbia law.

Georgia has a statute to the effect that no conviction shall be had for statutory rape on the unsupported testimony of the prosecutrix. The twelve year old prosecutrix in *Wright* v. *State,* 184 Ga. 62, 190 S.E. 663 (1937), was seduced by a fifty year old zoo attendant on a number of occasions while playing near the zoo. The court interpreted the statute to require corroboration as to both *corpus delicti* and identification, found that ample corroboration was available on both scores, held that the quantum of corroboration necessary is left entirely to the jury, and affirmed conviction. The interpretation by the Georgia court of a Georgia statute is not binding on this court in interpreting District of Columbia case law.

Prichard v. *State,* 135 Neb. 522, 282 N.W. 529 (1938), involved a thirteen year old prosecutrix of limited men-

tality whose hymen was found intact and whose testimony had many inconsistencies. There were indications of improper motive in previous bad feeling between prosecutrix' father and defendant over debts. The Nebraska court reversed conviction for assault with intent to rape for lack of corroboration. These facts would fully support a reversal under District of Columbia law as well as Nebraska Law. This provides no reason for an inflexible requirement for corroboration as to identification in all forcible or statutory rape cases, including those as far distant from the *Prichard* facts as is the instant case.

Iowa has a statute to the effect that a defendant cannot be convicted upon the prosecutrix' testimony unless she be corroborated by other evidence tending to connect the defendant with the commission of the crime. In *State* v. *Lehman*, 230 Iowa 141, 296 N.W. 819 (1941), where rape in a car had been alleged, the court reviewed evidence presented as identification corroboration, including identification by prosecutrix' brother of defendant's car as the one he had seen stop to pick up the prosecutrix. The court found the evidence insufficient to constitute corroboration, since even if defendant's car had been the one which picked up prosecutrix, that did not identify him as the driver. The Iowa court felt bound by its statute to apply such stringent standards in measuring whether circumstances in proof constituted corroboration as to identification. This statute has no force in the District of Columbia.

In *State* v. *Balles*, 47 N.J. 331, 221 A.2d 1 (1966), the court affirmed a conviction for acts tending to impair the morals of a nine year old girl. The court cited New Jersey authority that a conviction for a morals offense may be sustained there on the uncorroborated testimony of the victim, but also valued much circumstantial evidence corroborating the child's story which it found in the case. Nothing in the case requires automatic reversal of a District of Columbia forcible or statutory rape conviction because the prosecutrix's identification of the accused is not corroborated.

Evidence was thus sufficient in instant case to sustain a guilty verdict. The District court properly denied appellant's motions to dismiss the indictment and for a new trial.

II. Circumstances are in proof tending to support the complaining witness' story generally, and also tending specifically to link appellant to the crime, to corroborate her identification of him.

(Tr. 8-10, 14, 15, 31-33, 77, 99-101, 90, 38-71, 73-74, 98, 23, 38, 98, 77, 87, 100, 145, 138, 129, 119, 130, 30)

A. *The following circumstances in proof tend to support the complaining witness' story:* Timely medical examination indicated strongly that she had recently had initial sexual relations (Tr. 8-10, 14, 15). She made timely report to her mother and grandfather (Tr. 31-33) and to police (Tr. 77). The grandfather testified that she was emotionally very upset, crying, and incoherent at the time (Tr. 99). The police officer testified that she was crying and upset when he arrived (Tr. 77). The grandfather testified that her coat was muddy and her hair and general appearance disordered (Tr. 99-100), and that he saw scratches on her neck (Tr. 99-101). The police officer testified he saw "redness on her neck that appeared to be welts" (Tr. 90). The force used to produce the marks on her neck was unexplained other than by her testimony. Her testimony was internally consistent and not inherently improbable. It was unshaken by able and unlimited cross-examination (Tr. 38-71, 73-74). Despite the availability of investigative resources to the appellant, no evidence was introduced showing that the complaining witness had a bad reputation for veracity or chastity, or might suffer from psychopathy productive of a false accusation, although she had lived many years in the community (Tr. 98). These circumstances strongly support her story in general, and to that extent they tend to support her identification of the appellant as assailant.

B. *The following circumstances in proof tend specifically to support the complaining witness' identification of appellant as assailant:*

The crime took place sometime between about 8:30 p.m. (Tr. 23, 38, 98) and about 9:15 p.m. (Tr. 77, 87, 100). The owner of a nightclub one block away from the scene of the crime who had known appellant for five years (Tr. 145) testified that he saw appellant enter the club sometime between 8:00 p.m. on the night of the crime and about 2:00 a.m. on the following morning (Tr. 138). Appellant's mother testified that he left home about 6:30 p.m. (Tr. 129) and stayed out until about 11:00 p.m. (Tr. 119, 129), left again about 11:15 p.m. (Tr. 129) and returned for good about 11:30 or 11:45 p.m. (Tr. 130). This places appellant near the scene of the crime within a few hours of the act.

C. The circumstances in proof noted above amply corroborate complaining witness' positive identification of appellant, were that necessary.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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